IN THE SUPREME COURT OF OHIO

Fred L. Lager, Administrator of the Estate of Sara E. Lager, deceased,	Supreme Court Case Nos. 2007-1762 and 2007-1760
Appellee,	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
vs.	
Nationwide Mutual Fire Insurance Company	Court of Appeals Case No. L-07-1022
Appellant.	

MOTION FOR RECONSIDERATION OF APPELLEE, FRED L. LAGER, ADMINISTRATOR OF THE ESTATE OF SARA E. LAGER, DECEASED

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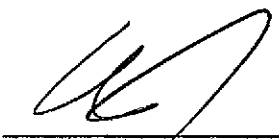
CLERK OF COURT
SUPREME COURT OF OHIO

Now comes the Appellee, Fred L. Lager, Administrator of the Estate of Sara E. Lager, deceased, by and through the undersigned counsel, and does hereby respectfully move this Court, pursuant to S. Ct. Prac. R. XI (2), to reconsider the decision on the merits of this case and judgment filed on October 1, 2008, for the reasons set forth in the memorandum below.



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The majority of this Court reasons that:

> (t)hough their wrongful death claim arose 'because of' Sara's bodily injury, i.e. her death, any coverage 'for' her bodily injury was extinguished because her bodily injury arose when she was in a motor vehicle that was not an insured vehicle under the Lagers' policy.
>
> *Lager v. Miller-Gonzalez,* Slip Opinion No. 2008-Ohio-4838, Paragraph 30.

According to the interpretation advanced by the majority it would just as logically follow that derivative claims, which also arise "because of" bodily injury, *Tomlinson v. Skolnik*, (1989), 44 Ohio St. 3d 11, 14, 15, 540 N.E. 2d 716, are likewise excluded by the "for bodily injury" language contained in the other owned vehicle exclusion clause. Put another way, though their derivative claim arose because of Sara's bodily injury, i.e., her physical injury or resultant death, <u>any</u> coverage "for" her bodily injury was extinguished because her bodily injury arose when she was in a motor vehicle that was not an insured vehicle under the Lagers' policy. Consistent with the analysis of the majority, derivative claims must, therefore, also be included in the category of "any coverage 'for' her bodily injury" and are, therefore, extinguished by the same "for bodily injury" language contained in the exclusion that the majority finds effectively excludes the Lagers' claims for wrongful death. If the "for bodily injury" language in the exclusion clause effectively excludes claims "because of" bodily injury and, therefore, derivative claims, what meaning, if any, is to be given to the balance of the exclusion clause which reads, "or derivative claims?" If the majority analysis is to remain consistent, then derivative claims, which are also "because of" bodily injury, must be effectively excluded by the "for bodily injury" language contained in the exclusion clause and thereby reducing the words "or derivative claims" to mere surplusage. If not expressly so, than

certainly by implication. Appellant, Nationwide, chose the words, "for bodily injury or derivative claims" to identify the types of coverage it intended to exclude in the other owned vehicle exclusion. By employing the word "or" Nationwide intended the phrases "for bodily injury" and "derivative claims" to indicate "an alternative between different or unlike things." *Pizza v. Sunset Fireworks Co., Inc.*, (1986), 25 Ohio St. 3d 1, 4-5, 25 OBR 1, 494 N.E. 2nd 1115. "That is, the policy's use of the disjunctive 'or' indicates that the two phrases were not intended to have the same meaning . . . ." *Ohio Govt. Risk Mgmt. Plan v. Harrison*, (2007), 115 Ohio St. 3d 241, 247, 2007-Ohio-4948. To decide, as the majority does, that the phrase "for bodily injury" in the exclusion clause standing alone effectively excludes "any coverage" "for bodily injury," including claims arising "because of" that bodily injury, would, and does necessarily, exclude derivative claims as well. In so deciding, the majority effectively deletes the words "or derivative claims" from the contract, or otherwise fails to consider the meaning of the same in the context of the exclusion. Such an interpretation in effect amounts to a re-writing of the contract, ignores the words employed by its author, and just as important, ignores the meaning and intent of those words as can be determined by general rules of contract interpretation. The majority opinion decides without comment, or analysis, what meaning, if any, should be attributed to the "or derivative claim" language in the exclusion clause and how that language can be reconciled to justify its analysis and, therefore, its decision in the present case. For the foregoing reasons, and for the reasons discussed in the Merit Brief of Appellee, Appellee respectfully requests reconsideration on this issue. See Merit Brief of Appellee, page 18-19.

The Appellee further requests reconsideration of the majority opinion and the decision that there is "nothing ambiguous, uncertain, or unclear about the meaning" of the other owned auto exclusion, not only for the reasons stated in the preceding paragraphs, but even more specifically, for the additional reasoning employed by the majority to justify its lack of ambiguity finding. The majority opinion seems to suggest the following syllogism: 1) The intent behind other owned vehicle exclusions is to limit coverage to vehicles identified in the policy. 2) The exclusion in the present case is an other owned vehicle exclusion. 3) Therefore, the intent of this exclusion is to limit coverage only to vehicles identified in the policy. Under this reasoning, it is difficult to imagine a scenario where any other owned vehicle exclusion could ever be susceptible to a finding of ambiguity so long as it could be demonstrated that the vehicle was not identified or covered under the policy for which coverage was requested. This is especially true given the fact that all claims for coverage must either be classified as either in the category of "because of bodily injury" or "for bodily injury." In that the majority finds the two expressions of coverage to mean the same thing, at least in the other owned vehicle exclusion context, it must logically follow that if it is an other owned vehicle exclusion that is under interpretation, ambiguities will be rare if not impossible to find. In all fairness, the majority does seem to leave open the possibility or potential of a finding of ambiguity in the context of other owned auto exclusion clauses by its citation of "familiar principles" which govern insurance contract law. However, this opening seems narrow indeed and is quickly closed by its conclusion that the very two phrases that have historically been used by insurance companies and this Court to define all, yet

very different causes of action present only, according to the majority, a "mere potential for ambiguity."

Appellee agrees with the majority that the intent of other owned vehicle exclusions in general is to limit coverage to vehicles identified, or otherwise covered under the policy, but Appellee also suggests that the intent to so limit does not, nor should not, prevail, nor should that intent be given added significance, if the balance of the exclusion defining the coverage excluded is not stated unambiguously.

For all of the reasons previously stated and for the reasons that follow, Appellee requests reconsideration of the majority opinion which finds that the language in the policy is not susceptible of more than one reasonable interpretation. At the outset it is worth repeating that by its decision the majority is of the opinion that there is only one reasonable interpretation of the interplay between the coverage clause and the exclusion clause and that interpretation is as stated in the majority opinion. Even if the Appellee were to concede the reasonableness of the majority opinion as but one reasonable interpretation, any concession in that regard would not preclude the advancement of yet another interpretation, if reasonable.

Appellee has advanced, both in its Merit Brief and at oral argument, many reasonable interpretations of the policy language which might apply and which would afford coverage for the claim presented. Appellee simply requests that the Court revisit and reconsider its majority opinion in light of the issues properly raised, but not considered.

In an effort to determine the intended meaning of the words and phrases used in the policy it is certainly instructive, if not dispositive, to consider the meanings as offered

and argued by its author. At oral argument Appellee directed this Court's attention to the argument of this very same party, Nationwide Mutual Fire Insurance Company, in the case of *Hall v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 05AP305, 2005-Ohio-4572. *Hall* involved not only the very same party, but the very same, in fact identical, policy language as in the case *sub judice*. In *Hall* Appellant argued that the words "derivative claims" contained in the exclusion clause were intended to exclude claims for wrongful death. Nationwide now argues that the words "for bodily injury" in the exclusion clause is meant to encompass and, therefore, exclude wrongful death claims. Reply Brief of Appellant, page 2, F.N.I. As stated by Appellee, at oral argument, this new position is again inconsistent with the previous arguments of Nationwide made throughout these proceedings in the lower courts, that the claims of the Lagers simply do not fit the definition of bodily injury as defined in the policy. In support, Appellee cited this Court, at oral argument, to a letter from the Appellant's claims adjuster that Appellee introduced as an exhibit in its motion for summary judgment. Likewise Appellee, again at oral argument, cited this Court to more than one reference contained in Nationwide's arguments during the proceedings in summary judgment that their position then was that the Lagers did not sustain a bodily injury as defined in the policy.

The Appellee requests that this Court reconsider the majority opinion and, therefore, consider Nationwide's previous and varying positions on the intended meaning of the words and phrases used in its policy as set forth above.

In doing so, Appellee submits that the conclusion is inescapable that the words "because of" bodily injury do not have the same intended meaning as the words, "for bodily injury," or, at the very least, the words and phrases are susceptible of at least

more than one reasonable interpretation and should, therefore, be construed liberally in favor of coverage.

In conclusion, Appellee respectfully requests reconsideration of this Court's majority opinion and judgment decided on October 1, 2008. Specifically, Appellee requests reconsideration of the decision on the merits as set forth herein. Upon reconsideration, Appellee requests and otherwise moves for a finding and decision that affirms the Decision and Judgment Entry of the Court of Appeals of Ohio, Sixth Appellate District, filed and journalized in the above referenced matter on August 10, 2007, for the reasons decided by said court therein, and for a decision consistent with the Proposition of Law advanced by this Appellee in these proceedings, that the language contained in the motor vehicle policy of insurance issued and delivered to Fred L. Lager and Cathy R. Lager by Appellant, Nationwide Mutual Fire Insurance Company, should be made available to the parents of the decedent to compensate them for the injuries and damages they have sustained as a direct and proximate result of the wrongful death of Sara E. Lager, deceased. Appellee specifically requests upon reconsideration that this Court decide that the coverage provisions contained in the policy of uninsured/underinsured insurance extending coverage "because of" bodily injury is ambiguous when considered with the language contained in the other owned auto exclusion clause of the policy which attempts to exclude coverage "for bodily injury."

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellee's Motion for Reconsideration was sent by facsimile and ordinary U.S. mail to Edward T. Mohler, one of the Attorneys for Appellant, Nationwide Mutual Fire Insurance Company, 420 Madison Avenue, Suite 650, Toledo, OH 43604, Facsimile No. (419) 242-7783, and Joyce V. Kimbler, one of the Attorneys for Appellant, Nationwide Mutual Fire Insurance Company, 50 South Main Street, Suite 502, Akron, OH 44308, Facsimile No. (330) 253-8875, on this 14th day of October, 2008.

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